

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

**LYNN HERNANDEZ, et al.,**

**Plaintiff,**

**v.**

**BAXTER HEALTHCARE  
CORPORATION, et al.,**

**Defendants.**

**Case No.: SACV 15-01075-CJC(DFMx)**

**ORDER DENYING PLAINTIFFS'  
MOTION TO REMAND AND  
GRANTING DEFENDANTS' MOTION  
TO DISMISS**

**I. INTRODUCTION & BACKGROUND**

On June 2, 2015, Plaintiffs Lynn Hernandez, Melanie Lira, Gloria Jiminez, and Angela Hernandez-Miranda (collectively, "Plaintiffs") brought this action in Orange County Superior Court against Defendants Baxter Healthcare Corporation; Cardinal

1 Health, Inc.; Cardinal Health 100, Inc.; Cardinal Health 200, LLC; Cardinal Health 201,  
 2 Inc.; Cardinal Health 411, LLC (collectively, “the Moving Defendants”); and Home  
 3 Dialysis Therapies of San Diego (“HDT”). (Dkt. No. 1 [“Notice of Removal”]; Exh. A.  
 4 [“Compl.”].) The Complaint alleges product liability claims against the Moving  
 5 Defendants and negligence claims against HDT, all arising from the death of Plaintiffs’  
 6 decedent, Mario Hernandez (“Decedent”). Plaintiffs contend that Mr. Hernandez’s death  
 7 is attributable either to a defect in a Baxter product known as a MiniCap or to the  
 8 negligence of HDT in training Plaintiff Lynn Hernandez and Decedent in how to use the  
 9 MiniCap.

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 11 Plaintiffs, California citizens, filed this action in state court. None of the Moving  
 12 Defendants is a California resident. (Notice of Removal ¶¶ 15–20.) HDT, which has not  
 13 yet been served, is apparently a California resident. (Notice of Removal ¶ 21.) On July  
 14 7, the Moving Defendants removed this action to this Court on the basis of diversity  
 15 jurisdiction, alleging that HDT was “fraudulently joined” in an effort by Plaintiffs to  
 16 defeat complete diversity and avoid removal. (Notice of Removal ¶¶ 22; 36.) Before the  
 17 Court are Plaintiffs’ motion to remand and the Moving Defendants’ motion to dismiss  
 18 HDT. (Dkt. Nos. 12; 15.) For the following reasons, the Court DENIES Plaintiffs’  
 19 motion to remand and GRANTS the Moving Defendants’ motion to dismiss HDT.<sup>1</sup>

## 20 21 **II. ANALYSIS**

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 23 Any civil action brought in a state court but over which a district court has  
 24 diversity jurisdiction may be removed. 28 U.S.C. §§ 1332, 1441(a). The defendant  
 25 removing the action to federal court bears the burden of establishing that the district court

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 27  
 28 <sup>1</sup> Having read and considered the papers presented by the parties, the Court finds this matter appropriate  
 for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set  
 for August 31, 2015 at 1:30 p.m. is hereby vacated and off calendar.

1 has subject matter jurisdiction over the action, and the removal statute is strictly  
 2 construed against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.  
 3 1992) (“Federal jurisdiction must be rejected if there is any doubt as to the right of  
 4 removal in the first instance.”). Diversity jurisdiction exists where the amount in  
 5 controversy exceeds \$75,000 and complete diversity exists among the parties. 28 U.S.C.  
 6 § 1332. “[O]ne exception to the requirement for complete diversity is where a non-  
 7 diverse defendant has been fraudulently joined.” *Hunter v. Philip Morris USA*, 582 F.3d  
 8 1039, 1043 (9th Cir. 2009).

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 10 “Joinder is fraudulent ‘if the plaintiff fails to state a cause of action against a  
 11 resident defendant, and the failure is obvious according to the settled rules of the state.’”  
 12 *Hunter*, 582 F.3d at 1043 (quoting *Hamilton Materials Inc. v. Dow Chem. Corp.*, 494  
 13 F.3d 1203, 1206 (9th Cir. 2007)). Conversely, “if there is any possibility that the state  
 14 law might impose liability on a resident defendant under the circumstances alleged in the  
 15 complaint, the federal court cannot find that joinder of the resident defendant was  
 16 fraudulent, and remand is necessary.” *Id.* at 1044. In determining whether a defendant  
 17 was fraudulently joined, all disputed questions of fact and all ambiguities in the  
 18 controlling state law must be resolved in favor of the non-moving party. *Plute v.*  
 19 *Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001). The  
 20 defendant may present additional facts to show that the joinder is fraudulent. *McCabe v.*  
 21 *Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). The removing party carries a  
 22 heavy burden of persuasion, as there is a presumption against finding fraudulent joinder.  
 23 *Id.*; see *Gaus*, 980 F.2d at 566.

24  
 25 Here, the Moving Defendants have met their heavy burden to show that HPC was  
 26 fraudulently joined. The third cause of action alleges that HDT “failed to use due care  
 27 and negligently, carelessly, recklessly, willfully, wantonly and tortiously trained Plaintiff  
 28 Lynn Hernandez and Decedent in the use of the [MiniCap] in their home.” (Compl.

¶ 63.) The Complaint indicates that the Plaintiffs discovered HDT’s negligence “on or after June 9, 2013, the date Decedent died.” (*Id.*) The Moving Defendants argue that the third cause of action is a professional negligence claim, which is subject to a one-year statute of limitations pursuant to California Code of Civil Procedure section 340.5 (“section 340.5”). Plaintiffs argue that the third cause of action is actually an ordinary negligence claim, and that it is therefore subject to a two-year statute of limitations. Cal. Code of Civ. Pro. §§ 335; 335.1. Because Plaintiffs filed this action between one and two years after the date of Decedent’s death, whether they can assert a claim against HDT—and therefore whether removal was proper—turns entirely upon whether the third cause of action is for professional negligence or ordinary negligence. *See Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007) (affirming district court’s remand where claims against non-diverse defendant were time-barred).

California Code of Civil Procedure § 340.5 provides that actions for injury or death against a “health care provider” that are “based upon such person’s alleged professional negligence” must be brought within “three years after the date of the injury or one year after the plaintiff discovers . . . the injury, whichever occurs first.” Section 340.5 defines “health care provider” as “any person[,] clinic, health dispensary, or health facility licensed pursuant” to a number of state statutes. *Id.* That section further defines professional negligence as “a negligent act or omission by a health care provider in the rendering of professional services . . . provided that such services are within the scope of the services for which the provider is licensed.” *Id.* § 340.5(2).

As an initial matter, Plaintiffs do not contend that HDT is not a “health care provider” under the meaning of section 340.5 or that it is not licensed to provide home dialysis care; indeed, Plaintiffs allege in the Complaint that the Decedent received “home peritoneal dialysis” from HDT. (Compl. ¶ 25.) It is also clear that California’s licensing requirements for chronic dialysis facilities specifically include patient training as being

1 within the scope of licensure. The California Health and Safety Code requires chronic  
2 dialysis clinics to “comply with federal certification standards for an end stage renal  
3 disease clinic.” Cal. Health & Saf. Code § 1225. And those federal standards  
4 specifically provide that a “dialysis facility that is certified to provide services to home  
5 patients . . . must oversee training of the home dialysis patient, the designated caregiver,  
6 or [the] self-dialysis patient.” 42 C.F.R. 494.100(a). Accordingly, training a home  
7 patient to correctly use dialysis equipment is within the scope of a California home  
8 dialysis provider’s license, and negligence claims related to training are therefore  
9 professional negligence claims covered under section 340.5’s one-year statute of  
10 limitations.

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12 Furthermore, California case law has long “broadly interpreted” section 340.5’s  
13 coverage. *So v. Shin*, 212 Cal. App. 4th 652, 663 (2013). Plaintiffs argue that HDT’s  
14 alleged negligent training does not qualify as “professional negligence” under section  
15 340.5 because that section does not apply to negligence that does not occur “in the  
16 capacity of delivering medical care to [a] patient.” (Dkt. No. 12 at 7.) But this  
17 mischaracterizes California case law. California courts routinely find that negligent acts  
18 outside the actual provision of medical care are nonetheless covered by section 340.5’s  
19 statute of limitations for professional negligence claims. For example, California courts  
20 have applied section 340.5’s one-year statute of limitations when a plaintiff was injured  
21 in the back of an ambulance when it hit a curb, *Canister v. Emergency Ambulance Serv.*,  
22 160 Cal. App. 4th 388 (2008); when a pharmacy failed to send out a recall notice,  
23 *Manion v. Vintage Pharms LLC*, No. C-13-2996 EMC, 2013 WL 5645159 (N.D. Cal.  
24 Oct. 16, 2013); when a hospital hired a doctor, *So*, 212 Cal. App. 4th 652, (2013); and  
25 when a patient fell off an X-ray table while unattended, *Bellamy v. Appellate Dep’t*, 50  
26 Cal. App. 4th 797 (1996). Training a patient to properly use a medical device is much  
27 more closely connected to the provision of medical care than any of these.

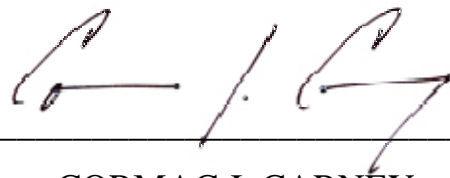
1 Plaintiffs offer two cases to support their contention that HDT's alleged negligence  
2 was ordinary and not professional: *So*, 212 Cal. App. 4th 652, and *Atienza v. Taub*, 194  
3 Cal. App. 3d 388 (1987). But as the *Manion* court explained, *So* and *Atienza* both stand  
4 for the proposition that the only situation in which section 340.5 does not apply is when  
5 health care providers' "conduct [is] not for the *purpose* of delivering health care."  
6 *Manion*, 2013 WL 5645159, at \*3 (emphasis added). In *So*, for example, an  
7 anesthesiologist was alleged to have shown a patient the product of her miscarriage in an  
8 effort to persuade the patient to not report that she had woken up during a dilation and  
9 curettage procedure. The court held that the statute of limitations from section 340.5 did  
10 not apply, reasoning that the doctor had acted "for her own benefit," and not "for the  
11 purpose of delivering health care to a patient." *So*, 212 Cal. App. 4th at 666–667.  
12 Similarly, in *Atienza v. Taub*, 194 Cal. App. 3d 388 (1987), the court held that tort claims  
13 arising from a doctor's sexual relationship with a patient were not subject to the  
14 professional negligence statute of limitations, since the sexual relationship was not an  
15 "effort to accomplish the purpose for which the physician [was] employed." *Id.* at 391.  
16 Here, by contrast, Plaintiffs do not allege that HDT's training was not for the purpose of  
17 delivering health care. *So* and *Atienza* are therefore inapposite.

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19 In short, Plaintiffs have not provided, nor can the Court locate, any support in  
20 California law for the proposition that training an individual in how to properly use a  
21 medical device would not be "within the scope of services" for which a home dialysis  
22 clinic is licensed, particularly where, as here, the relevant licensing requirements  
23 specifically cover training. Accordingly, Plaintiffs' pleaded claims against HDT are for  
24 professional negligence, and those claims are time-barred by section 340.5. Defendants  
25 have carried their heavy burden to demonstrate that HDT was fraudulently joined.  
26 Plaintiffs' motion to remand is therefore DENIED, and the Moving Defendants' motion  
27 to dismiss is GRANTED. HDT is DISMISSED from this case.  
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1 **III. CONCLUSION**

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3 For the foregoing reasons, Plaintiffs' motion to remand is DENIED and the  
4 Moving Defendants' motion to dismiss is GRANTED. HDT is DISMISSED from this  
5 case.  
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10 DATED: August 25, 2015

A handwritten signature in dark ink, appearing to read 'C. J. Carney', is written over a horizontal line.

11  
12 CORMAC J. CARNEY  
13 UNITED STATES DISTRICT JUDGE  
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